FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LIL' MAN IN THE BOAT, INC., a California Corporation, *Plaintiff-Appellant*,	No. 19-17596
v.	D.C. No. 4:17-cv-00904-JST
CITY AND COUNTY OF SAN FRANCISCO; SAN FRANCISCO PORT COMMISSION, operating under the title Port of San Francisco; ELAINE FORBES, Interim Executive Director; PETER DALEY, Deputy Director, Maritime the San Francisco Port; JEFF BAUER, Deputy Director of Real Estate, the San Francisco Port; JOE MONROE, Harbormaster, South Beach Harbor, Pier 40, *Defendants-Appellees*.	OPINION

Appeal from the United States District Court
for the Northern District of California
Jon S. Tigar, District Judge, Presiding

Argued and Submitted December 8, 2020
San Francisco, California

Filed July 15, 2021

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Before: Mary H. Murguia and Morgan Christen, Circuit Judges, and William K. Sessions III,* District Judge.

Opinion by Judge Christen

SUMMARY**

Civil Rights

The panel affirmed the district court's summary judgment in favor of several municipal entities and officials in an action brought by a commercial charter business alleging that the municipal entities and officials violated the Rivers and Harbors Act, 33 U.S.C. § 5(b)(2), by imposing landing fees on commercial charters operating out of South Beach Harbor Marina in San Francisco Bay.

The district court concluded that Congress did not intend the Rivers and Harbors Act (RHA) to restrict the type of fees defendants imposed. The panel affirmed the district court's order on alternate grounds: the panel saw no indication that Congress intended to create a private right of action in § 5(b)(2).

Because the parties agreed that § 5(b)(2) did not expressly provide a private right of action, the panel, applying *Cort v.*

* The Honorable William K. Sessions III, United States District Judge for the District of Vermont, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Ash, 422 U.S. 66 (1975), considered the statute's language, structure, context, and legislative history to determine whether a private right of action was implied. The panel determined that nothing in the text or structure of § 5(b)(2) reflected a clear and unambiguous intent to create a private right of action. To begin, the panel determined that § 5(b)(2) lacked rights-creating language. The panel noted that the statute prohibits non-federal entities from imposing fees or other charges (the obligation) and refers to vessels only as an object of that obligation. This distinguished § 5(b)(2) from statutes that target a class of beneficiaries as their subject.

The panel next determined that the absence of an expressly identified remedy in § 5(b)(2) also presented a significant textual clue that Congress did not intend to confer private rights. The panel noted that § 5(b)(2) does not include any remedial language; rather, it limits the ability of non-federal interests to impose fees on vessels, their passengers, and crews in federally controlled navigable waters. The panel saw no indication that Congress intended § 5(b)(2) to confer an individual benefit upon vessels. Rather, the benefit they receive appeared to be ancillary to the statute's goals.

The panel determined that nothing in the legislative history suggested that Congress contemplated the creation of a separate private right or private remedy in § 5(b)(2). The panel additionally determined that because the free movement of commerce and national security were interests historically safeguarded by the federal government, the absence of an implied right of action in § 5(b)(2) was consistent with the overall statutory scheme of the RHA.

The panel stated that to the extent that plaintiff argued that it could not vindicate its rights if § 5(b)(2) did not

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include a private right of action, plaintiff overlooked that the reasonableness of the landing agreement, which had altered the terms of the contract for use of the marina, was subject to challenge pursuant to the Tonnage Clause. Finally, citing *California v. Sierra Club*, 451 U.S. 287 (1981), the panel held that even if there were no alternative mechanisms for private enforcement, this alone would not require the panel to infer a private right of action.

COUNSEL

Lawrence D. Murray (argued), Murray & Associates, San Francisco, California; Steven E. Bers (argued), Whiteford Taylor & Preston LLP, Baltimore, Maryland; for Plaintiff-Appellant.

Tara M. Steeley (argued) and Wayne Snodgrass, Deputy City Attorneys; Dennis J. Herrera, City Attorney; Office of the City Attorney, San Francisco, California; for Defendants-Appellees.

OPINION

CHRISTEN, Circuit Judge:

Plaintiff Lil' Man in the Boat (Lil' Man) seeks reversal of a district court order granting summary judgment on its claim that several municipal entities and officials (collectively, defendants) violated the Rivers and Harbors Act, 33 U.S.C. § 5(b)(2) (RHA), by imposing landing fees on commercial charters operating out of South Beach Harbor Marina in San Francisco Bay. The district court concluded that Congress

did not intend the RHA to restrict the type of fees defendants imposed. We affirm the district court's order dismissing Lil' Man's RHA claim on alternate grounds: we see no indication that Congress intended to create a private right of action in § 5(b)(2).

I

Lil' Man is a commercial charter business that provides transportation and hospitality services in San Francisco Bay. Lil' Man uses South Beach Harbor as a base for its commercial enterprises. Defendants are the City and County of San Francisco; the San Francisco Port Commission; Port officials Elaine Forbes, Peter Daley, and Jeff Bauer; and Harbormaster Joe Monroe. Together, the defendants own, operate, and regulate the Port of San Francisco and the South Beach Harbor.

Until 2016, Lil' Man paid a landing fee of $80 per docking to load and unload passengers at the South Beach Harbor. In 2016, defendants increased the landing fee to $110 and asked Lil' Man and all other commercial vessels to sign a Landing Agreement that altered the terms of the contract for using the marina. In addition to increasing the landing fee, the Landing Agreement required a "gross revenue fee" that applied only in months the vessel docked at the port. The gross revenue fee was to be 7% of the user's monthly gross revenues, in any month that 7% of the user's gross revenues exceeded the user's monthly landing fees.[1] Lil' Man refused to sign the Landing Agreement but twice

[1] The gross revenue fee excluded "[s]ums collected for any sales or excise tax imposed directly upon Licensee by any duly constituted governmental authority."

paid the gross revenue fee for charters booked prior to implementation of the Agreement.

Lil' Man brought suit in the Northern District of California pursuant to 42 U.S.C. § 1983, alleging the Landing Agreement violated the Tonnage Clause, the dormant Commerce Clause, the First Amendment, and § 5(b) of the RHA, 33 U.S.C. § 5(b). Though Lil' Man's complaint did not specify a particular sub-section of § 5(b), it expressly incorporated the language of § 5(b)(2). Specifically, the complaint alleged the new fees violated the RHA because they were "not reasonable and [were] not charged on a fair and equitable basis;" were "used for purposes other than to pay for the cost of services" to vessels; did not "enhance the safety and efficiency of interstate commerce;" and "impose[d] burdens on interstate commerce." 33 U.S.C. § 5(b)(2)(A)–(C). These allegations make plain that Lil' Man's RHA claim is premised on § 5(b)(2), which allows for the imposition of "reasonable fees charged on a fair and equitable basis."

The First Amendment claim asserted that the Landing Agreement violated Lil' Man's right to petition the government because the Agreement included a provision waiving the right to challenge the fees. The district court granted defendants' motion for judgment on the pleadings with respect to this claim because Lil' Man had not signed the Landing Agreement. After the parties engaged in discovery, they filed cross-motions for summary judgment on Lil' Man's remaining claims.

The district court granted defendants' motion for summary judgment. The court relied on *Asante v. California Department of Health Care Services*, 886 F.3d 795 (9th Cir.

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2018), and *American Trucking Ass'ns v. City of Los Angeles*, 569 U.S. 641 (2013), to conclude the Landing Agreement did not violate the dormant Commerce Clause because defendants, through the Port, operated as market participants subject to market pressures, and were therefore "exempt from the dormant Commerce Clause." The court ruled that the landing fees did not violate the Tonnage Clause because the fees were charged in exchange for services provided to vessels and not for general revenue-raising purposes. *See Clyde Mallory Lines v. Alabama ex rel. State Docks Comm'n*, 296 U.S. 261, 265–66 (1935); *see also Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 10 (2009).

Turning to the RHA claim, the district court concluded that Congress intended § 5(b) "to clarify existing law with respect to Constitutionally permitted fees and taxes on a vessel, and to prohibit fees and taxes on a vessel simply because that vessel sails through a given jurisdiction." The court granted summary judgment to defendants on the § 5(b)(2) claim because it concluded Congress did not intend § 5(b)(2) to apply to the fees imposed by the Landing Agreement. Lil' Man appeals only the dismissal of this claim and an evidentiary ruling excluding former harbor attendant Paul Dima's declaration from consideration at the summary judgment stage.[2] We have jurisdiction pursuant to 28 U.S.C. § 1291.

[2] Because we conclude Lil' Man has no private right of action, we do not reach whether the district court properly excluded Dima's declaration from consideration.

II

We review de novo a district court's order granting summary judgment. *L.F. ex rel. v. Lake Washington Sch. Dist. #414*, 947 F.3d 621, 625 (9th Cir. 2020). We must "determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Id.* (quoting *Wallis v. Princess Cruises, Inc.*, 306 F.3d 827, 832 (9th Cir. 2002)). "There is no genuine issue of fact if, on the record taken as a whole, a rational trier of fact could not find in favor of the party opposing the motion." *West v. State Farm Fire & Cas. Co.*, 868 F.2d 348, 350 (9th Cir. 1989). Questions of statutory interpretation are addressed de novo. *United States v. Northrop Corp.*, 59 F.3d 953, 959 (9th Cir. 1995). We may affirm the district court's order on any basis supported by the record. *McSherry v. City of Long Beach*, 584 F.3d 1129, 1135 (9th Cir. 2009).

III

A

33 U.S.C. § 5, commonly known as the Rivers and Harbors Act of 1884, prohibits tolls and operating charges for vessels passing through any lock, canal, canalized river, "or other work for the use and benefit of navigation" belonging to the United States. *See* 33 U.S.C. § 5, 23 Stat. 147 (July 5, 1884). Section 5 has been modestly amended on several occasions, but it was significantly revised in 2002 in conjunction with amendments to the Maritime Transportation Security Act (MTSA) as part of a comprehensive overhaul of the Merchant Marine Act of 1936. *See* MTSA, Pub. L. No.

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107-295, § 101(13), 116 Stat. 2064 (2002); H.R. Rep. No. 108-334, at 180 (2003) (Conf. Rep.). Congress took this step following the September 11, 2001 terrorist attacks on the World Trade Center out of concern that United States ports were vulnerable to security breaches. *See* MTSA, Pub. L. No. 107-295, § 101(6)–(13), 116 Stat. 2064 (2002). Through the MTSA, Congress established a program that balanced the nation's concern for increased port security with the need to ensure the free flow of interstate and foreign commerce. *See id.*

The 2002 amendment modified § 5's prohibition of tolls and operating charges and allowed the imposition of some charges, consistent with Tonnage Clause and Commerce Clause case law. *See* 33 U.S.C. § 5(b). The current version of § 5(b) provides:

> (b) No taxes, tolls, operating charges, fees, or any other impositions whatever shall be levied upon or collected from any vessel or other water craft, or from its passengers or crew, by any non-Federal interest, if the vessel or water craft is operating on any navigable waters subject to the authority of the United States, or under the right to freedom of navigation on those waters, except for
>
> > (1) fees charged under section 2236 of this title;
> >
> > (2) reasonable fees charged on a fair and equitable basis that--

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> (A) are used solely to pay the cost of a service to the vessel or water craft;
>
> (B) enhance the safety and efficiency of interstate and foreign commerce; and
>
> (C) do not impose more than a small burden on interstate or foreign commerce; or
>
> (3) property taxes on vessels or watercraft, other than vessels or watercraft that are primarily engaged in foreign commerce if those taxes are permissible under the United States Constitution.

33 U.S.C. § 5(b).

As several courts have observed, the 2002 amendment codified Commerce Clause and Tonnage Clause common law.[3] A few courts have considered § 5(b) challenges to fees imposed upon vessels,[4] but we are aware of just one that has squarely considered whether § 5(b)(2) includes a private right

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[3] *See, e.g.*, *Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Auth.*, 566 F. Supp. 2d 81, 102 (D. Conn. 2008), *aff'd*, 567 F.3d 79 (2d Cir. 2009); *State, Dep't of Nat. Res. v. Alaska Riverways, Inc.*, 232 P.3d 1203, 1222 (Alaska 2010).

[4] *See, e.g.*, *Bridgeport*, 566 F. Supp. 2d at 102; *Alaska Riverways, Inc.*, 232 P.3d at 1222; *City of Chicago Through Dep't of Fin. v. Wendella Sightseeing, Inc.*, 143 N.E.3d 771, 777–78 (Ill. App. Ct. 2019), *appeal denied sub nom. City of Chicago v. Wendella Sightseeing, Inc.*, 135 N.E.3d 544 (Ill. 2019).

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of action. *See Cruise Lines Int'l Ass'n Alaska v. City & Borough of Juneau*, 356 F. Supp. 3d 831, 845–47 (D. Alaska 2018).

In the district court, Lil' Man argued that the fee imposed by the Landing Agreement violates § 5(b)(2) because it was calculated as a percentage of vessels' gross revenues, and not solely to pay for services provided to vessels. Lil' Man further argued that the fees imposed by the Landing Agreement were not imposed on a fair and equitable basis. Defendants urged the district court to dismiss Lil' Man's complaint because § 5(b)(2) does not provide a private right of action, and also argued the new fees were correctly assessed. The district court did not rule on defendants' first argument. Because Lil' Man cannot bring its RHA claim if § 5(b)(2) does not provide a private right of action, we first consider that threshold question. *See Logan v. U.S. Bank Nat'l Ass'n*, 722 F.3d 1163, 1169 (9th Cir. 2013). It is an issue of first impression.

B

i

"Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). "Congress may so empower litigants expressly or implicitly." *UFCW Local 1500 Pension Fund v. Mayer*, 895 F.3d 695, 699 (9th Cir. 2018). If Congress does not provide a private right of action explicitly within a statute's text, we must determine whether Congress implied one. *See Nisqually Indian Tribe v. Gregoire*, 623 F.3d 923, 929–30 (9th Cir. 2010).

The parties agree that § 5(b)(2) does not expressly provide a private right of action, so we consider the statute's language, structure, context, and legislative history to determine whether a private right of action is implied. *Logan*, 722 F.3d at 1170. "[C]lear and unambiguous terms" are "required for Congress to create new rights enforceable under an implied private right of action." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 290 (2002).

The Supreme Court initially identified four factors relevant to determining whether a statute contains an implied private right of action: "(1) whether the plaintiff is 'one of the class for whose especial benefit the statute was enacted'; (2) whether there is 'any indication of legislative intent, explicit or implicit, either to create [a private right of action] or to deny one'; (3) whether an implied private cause of action for the plaintiff is 'consistent with the underlying purposes of the legislative scheme'; and (4) whether the cause of action is 'one traditionally relegated to state law.'" *Logan*, 722 F.3d at 1170 (quoting *Cort v. Ash*, 422 U.S. 66, 78 (1975)). Since announcing this test, "the Supreme Court has elevated intent into a supreme factor," and *Cort*'s other three factors are used to decipher congressional intent. *Id*. at 1171.

ii

To determine whether Lil' Man is one of a class "for whose especial benefit the statute was enacted," we examine § 5(b)(2)'s text and look for "rights-creating language." *See Sandoval*, 532 U.S. at 288–89. "Statutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'" *Id.* at 289 (quoting *California v. Sierra Club*, 451 U.S. 287, 294 (1981)). The Supreme Court has

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explained that "[t]he question is not simply who would benefit from [an] Act, but whether Congress intended to confer federal rights upon those beneficiaries." *Sierra Club*, 451 U.S. at 294.

In *Sandoval*, the Supreme Court considered whether § 602 of the Civil Rights Act, 42 U.S.C. § 2000d-1, created a private cause of action. 532 U.S. at 288–89. The Court compared § 602 to § 601 and cited its decision in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), where the Court had previously recognized that § 601 does create a private right of action. *See Sandoval*, 532 U.S. at 288–89 (quoting *Cannon*, 441 U.S. at 690–91). *Sandoval* explained that the clear focus of § 601 is protecting a class of beneficiaries from discrimination because its text expressly mandates that "[n]o person . . . shall . . . be subjected to discrimination." *Id.* at 288–89 (quoting 42 U.S.C. § 2000d). In contrast, § 602 authorizes federal agencies "to effectuate" § 601 "by issuing rules, regulations, or orders . . . ." *See id.* at 278 (quoting 42 U.S.C. § 2000d-1). The Court observed that the "rights-creating language so critical to the Court's analysis in *Cannon*" is completely absent from § 602, and held that § 602 does not include an implied right of action. *Id*. at 289–90, 293 (internal quotation marks omitted).

We addressed another statute that lacks rights-creating language, the Investment Company Act of 1940, in *UFCW Local 1500 Pension Fund v. Mayer*, 895 F.3d at 698–99. One section of that statute dictated "[n]o investment company" shall "engage in any business in interstate commerce" unless it registers with the Securities and Exchange Commission. 15 U.S.C. § 80a-7(a)(4). Because the statute's aim was to regulate the conduct of investment companies, we held it did not create a private right of action. *UFCW*, 895 F.3d at 699

(citing *Northstar Fin. Advisors, Inc. v. Schwab Invs.*, 615 F.3d 1106, 1115–16 (9th Cir. 2010)). We explained that a separate section of the statute, which directed the SEC to take certain actions, was "yet a step further removed from having rights-creating language" because it "focuse[d] neither on the individuals protected nor even on the [parties] being regulated, but on the agenc[ies] that will do the regulating." *Id.* (citing *Sandoval*, 532 U.S. at 289, and 15 U.S.C. § 80a-3(b)(2)) (internal quotation marks omitted). Thus, the statutory language in *UFCW* "doom[ed] any suggestion that Congress intended to create a private right." *Id.*

A statute must also display an intent to create a private remedy in order to create an implied right of action. We have previously recognized the Supreme Court's direction that "[w]ithout evidence of a congressional intent to create both a private right and a private remedy, a private right of action 'does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.'" *UFCW*, 895 F.3d at 699 (quoting *Sandoval*, 532 U.S. at 286–87)). General language or reference to a statute's remedial purpose is not enough to suggest congressional intent to create a remedy; something more is required. *See Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 24 (1979) (observing that even a statute intended to protect a class of beneficiaries does not require the conclusion that Congress intended to imply a private cause of action for damages). The absence of remedial language is a key clue that Congress did not intend to imply a private right of action. *Id.*

We examined these concepts thoroughly in *Logan v. U.S. Bank National Ass'n*, 722 F.3d at 1169–73. In that case, we concluded that the Protecting Tenants at Foreclosure Act

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(PTFA) does not include a private right of action. *Logan* first observed that, by its terms, the PTFA is aimed at "the regulated party" and is "framed in terms of the obligations imposed on the regulated party . . . while the [tenant] is referenced only as an object of that obligation." *Id.* at 1171. This language indicates that Congress's aim was regulating foreclosure procedures, rather than providing a benefit to tenants. *Id.* We explained that "[s]tatutes containing general proscriptions of activities or focusing on the regulated party rather than the class of beneficiaries whose welfare Congress intended to further do not indicate an intent to provide for private rights of action." *Id.* (citation and internal quotation marks and alteration omitted).

As in *Logan*, nothing in the text or structure of § 5(b)(2) reflects a clear and unambiguous intent to create a private right of action. *Id.* at 1171. To begin, § 5(b)(2) lacks rights-creating language. The statute prohibits non-federal entities from imposing fees or other charges (the obligation) and refers to vessels "only as an object of that obligation." *Id.*; *see also* 33 U.S.C. § 5(b) ("No . . . fees . . . shall be levied upon or collected from any vessel or other water craft, or from its passengers or crew, by any non-Federal interest . . . ."). This distinguishes § 5(b)(2) from statutes that target a class of beneficiaries as their subject. *See Cannon*, 441 U.S. at 689–90. Section 5(b)(2)'s imposition of an express prohibition on the conduct of non-federal entities—a command we have already held lacks rights-creating language—strongly suggests that § 5(b)(2) is "the kind of general ban" that carries no implied intent "to confer rights on a particular class of persons." *Sierra Club*, 451 U.S. at 294; *UFCW*, 895 F.3d at 699 (citing *Northstar*, 615 F.3d at 1109–10); *see Logan*, 722 F.3d at 1171.

The absence of an expressly identified remedy in § 5(b)(2) also presents a significant textual clue that Congress did not intend to confer private rights. *See Sierra Club*, 451 U.S. at 294–98. "[E]ven where a statute is phrased in [] explicit rights-creating terms, a plaintiff suing under an implied right of action still must show that the statute manifests an intent 'to create not just a private right but also a private remedy.'" *Gonzaga*, 536 U.S. at 284 (quoting *Sandoval*, 532 U.S. at 286) (emphasis omitted). Section 5(b)(2) does not include any remedial language; rather, it limits the ability of non-federal interests to impose fees on vessels, their passengers, and crews in federally controlled navigable waters. We see no indication that Congress intended § 5(b)(2) to confer an individual benefit upon vessels. Rather, the benefit they receive appears to be ancillary to the statute's goals. *See Sierra Club*, 451 U.S. at 297–98.

iii

Cort also instructs that we may consider legislative history if a statute's text or structure is unclear regarding the intent to create a right of action, or the legislative history squarely contradicts the statute's text. *See Logan*, 722 F.3d at 1171. We find no ambiguity, but note that § 5(b)'s legislative history reinforces the conclusion that the statute does not afford a private right of action.

Legislative history from both the original enactment and intervening amendments helps to divine congressional intent. *See id.* at 1172–73. As originally enacted, the RHA generally prohibited non-federal actors from imposing tolls on vessels and their passengers and crews, thereby facilitating free travel from one port to another. *See* 15 Cong. Rec. 5831–32 (July

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1, 1884) (observing the need for appropriations "to keep commerce moving upon these waters" by avoiding obstructions in navigable channels); H.R. Rep. No. 1544, at 6 (1884). The 1884 Act provided:

> That no tolls or operating charges whatsoever shall be levied or collected upon any vessel or vessels, dredges, or other passing watercraft through any canal or other work for the improvement of navigation belonging to the United States; and for the purpose of preserving and continuing the use and navigation of said canals, rivers, and other public works . . . the Secretary of War . . . is hereby authorized to draw his warrant or requisition from time to time upon the Secretary of the Treasury to pay the actual expenses of operating and keeping said works in repair . . .

23 Stat. 133, 147 (July 5, 1884).

In 1909, Congress amended the statute to add more federally controlled waterways, to expand the meaning of "belonging to the United States," and to allow spending for the purpose of "preserving and continuing the use and navigation of . . . canals and other public works." *See* 35 Stat. 815 (Mar. 3, 1909). The RHA was not materially amended again until 2002.[5]

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[5] A 1947 supplement to the U.S. Code altered "Secretary of War" to "Secretary of the Army," 33 U.S.C. § 5 (Supp. I 1947), and a 1954 supplement repealed a proviso requiring an itemized statement of expenses, 33 U.S.C. § 5 (Supp. II 1954).

The 2002 amendment added exceptions to the RHA's general ban on tolls and taxes, harmonizing the RHA with Tonnage Clause and Commerce Clause common law that allows local entities to charge fees in exchange for services provided to the vessels. *See* 33 U.S.C. § 5. The amendment was intended to "clarify existing law with respect to Constitutionally permitted fees and taxes on a vessel," and "prohibit fees and taxes imposed on a vessel simply because that vessel sails through a given jurisdiction." H.R. Rep. No. 108–334, at 180 (2003) (Conf. Rep.). On the House floor, the Chair of the Transportation and Infrastructure Committee explained that the bill would prevent "local jurisdictions [from] impos[ing] taxes and fees on vessels merely transiting or making innocent passage through navigable waters . . . ." 148 Cong. Rec. E2143–04 (2002).

The district court appears to have relied heavily on the Committee Chair's floor statement when it concluded that Congress did not intend § 5(b) to apply to the type of fees imposed by the Landing Agreement. But the Conference Committee's report, the Chair's floor statement, and the text of the 2002 amendment make clear that in addition to retaining the prohibition against taxing vessels for merely transiting federally controlled waters, Congress also intended to permit several exceptions to § 5(b)'s general prohibition, including the imposition of fees for services rendered to vessels that enhance the safety and efficiency of interstate and foreign commerce. *See* § 5(b)(2).

Facilitating commerce was clearly a focus of the 2002 amendment, as reflected by the condition in § 5(b)(2)(C) that any fees may not impose "more than a small burden on interstate or foreign commerce." *See also* MTSA, Pub. L. No. 107-295, § 101(12), 116 Stat. 2064 (2002). And as we

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have explained, the 2002 amendment brought the RHA in line with Commerce Clause and Tonnage Clause jurisprudence. *See supra.* In all, nothing in the legislative history suggests that Congress contemplated the creation of a separate private right or private remedy in § 5(b)(2).

iv

Cort's third factor looks to whether an implied private right of action is consistent with the underlying purposes of the RHA. *See Cort*, 422 U.S. at 78. Consideration of this factor also suggests that Congress did not intend to imply a private right of action in § 5(b)(2). Congress adopted a number of provisions governing the use, administration, and navigation of the waters of the United States in Title 33, and § 5(b) is part of this complex regulatory scheme. *See Sierra Club*, 451 U.S. at 289, 297–98 (addressing the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403); *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 408 (1982) (Powell, J., dissenting) (observing "modern federal regulatory statutes tend to be exceedingly complex" and suggesting the Court should be wary of inferring private rights of action). Because the free movement of commerce and national security are interests historically safeguarded by the federal government, the absence of an implied right of action in § 5(b)(2) is consistent with the overall statutory scheme.[6]

[6] The existence of another provision in the statutory scheme that *expressly* creates a private right of action supports this conclusion. Section 5(b)(1) permits non-federal interests to impose fees on vessels pursuant to 33 U.S.C. § 2236, part of the Water Resources Development Act of 1986. *See* Pub. L. No. 99-662, § 208, 100 Stat. 4082. That statute allows the imposition of port or harbor dues to finance harbor navigation projects such as removing obstructions to navigation or widening channels

The last *Cort* factor asks us to consider whether the cause of action is traditionally relegated to state law. *Cort*, 422 U.S. at 78. The types of fees at issue here are sometimes challenged pursuant to state law and sometimes challenged pursuant to federal law. *See, e.g.*, *Bridgeport*, 566 F. Supp. 2d at 96–105 (analyzing plaintiffs' claims that passenger fees violated both federal and state law). This factor does not materially affect our analysis given the weight of the other factors. *See Sierra Club*, 451 U.S. at 297 ("Here consideration of the first two *Cort* factors is dispositive.").

V

Lil' Man contends that a private right of action to enforce § 5(b)(2) must be implied because private charters benefit from the RHA's prohibition on local authorities imposing unreasonable fees on vessels that call at their ports. Lil' Man argues that if it cannot bring suit to enforce § 5(b)(2)'s provisions, no one can, and it urges that § 5(b)(2) must not be

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for vessel transit. *See* 33 U.S.C. § 2236(a)(1)–(3). Section 2236 includes an express private right of action for any party aggrieved by the imposition of such fees. *Id.* § 2236(b)(2). Lil' Man does not allege that defendants violated § 5(b)(1) or § 2236. Nor do the parties allege that defendants followed § 2236's procedural steps, including notice and a hearing, before imposing the fees, and Lil' Man does not allege that it filed its complaint within the 180-day window that § 2236 provides. *Id.* § 2236(a)(5), (b)(2). Instead, Lil' Man's complaint explicitly uses the language of § 5(b)(2), which makes no comparable allowance for private claims. We conclude it is "highly improbable that Congress absentmindedly forgot to mention an intended private action" in § 5(b)(2) when it simultaneously incorporated § 2236's private right of action into § 5(b)(1). *Logan*, 722 F.3d at 1170–71 (quoting *Transamerica Mortg. Advisors*, 444 U.S. at 20); *see, e.g.*, *Sandoval*, 532 U.S. at 288–89 (finding no private right of action to enforce § 602 of Title VI of Civil Rights Act).

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left without any enforcement mechanism. We are not persuaded.

First, to the extent Lil' Man argues it cannot vindicate its rights if § 5(b)(2) does not include a private right of action, Lil' Man overlooks that the reasonableness of the Landing Agreement is subject to challenge pursuant to the Tonnage Clause. *See Cruise Lines Int'l*, 356 F. Supp. 3d at 852–53 (considering challenge brought pursuant to the Tonnage Clause to passenger fees imposed upon vessels by non-federal authority); *see also San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1095–96 (9th Cir. 2005) (explaining that alternate avenue for litigation, via Administrative Procedure Act, weighed against finding private right of action).

Second, even if there were no alternative mechanism for private enforcement, this alone would not require us to infer a private right of action. In *California v. Sierra Club*, the Supreme Court construed § 10 of the Rivers and Harbors Appropriation Act of 1899 and determined that it does not include an implied private right of action. 451 U.S. at 292–98. Plaintiffs in *Sierra Club* sought to prevent the State of California from constructing water storage and diversion facilities. *Id.* at 290–91. The statute at issue in *Sierra Club* prohibited "[t]he creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States . . . ." *Id.* (quoting 33 U.S.C. § 403). The Supreme Court reasoned "Congress was concerned not with private rights but with the Federal Government's ability to respond to obstructions on navigable waterways," and observed that the statute benefits the public at large because it empowers "the Federal Government to exercise its authority over interstate commerce with respect

to obstructions on navigable rivers caused by bridges and similar structures." *Id.* at 295–96.

The lack of any private enforcement mechanism did not require an alternate conclusion in *Sierra Club*, nor does it here. *See id.* at 297–98; *Three Rivers Ctr. for Indep. Living, Inc. v. Hous. Auth. of City of Pittsburgh*, 382 F.3d 412, 420 (3d Cir. 2004) (explaining "[s]ome statutes create rights in individuals that are only enforceable by agencies . . . or not enforceable at all").[7]

C

We are aware of just one case, *Cruise Lines International*, 356 F. Supp. 3d at 845–47, in which a federal court has directly addressed whether Congress implied a private right of action in § 5(b)(2).[8] In *Cruise Lines*, a trade organization challenged passenger fees imposed by the City of Juneau to fund municipal departments performing services for passengers, projects and services for Juneau's tourist-laden downtown area, and waterfront capital projects. *Id.* at

[7] Lil' Man argues that the subject landing fee is per se invalid because it is calculated as 7% of a vessel's gross revenue and the plain text of § 5(b)(2) only permits docking fees that are *solely* related to services rendered to vessels. We do not reach the reasonableness of the fees under § 5(b)(2) because we conclude § 5(b)(2) does not include an implied right of action. Whether the landing fees violate the Tonnage Clause is a question beyond the scope of this appeal because Lil' Man did not appeal the dismissal of its Tonnage Clause claim.

[8] *Bridgeport* questioned whether a private right of action is implied in § 5(b) but it did not resolve the question because the court concluded the challenged passenger fee violated the Tonnage Clause. 566 F. Supp. 2d at 102–03 ("It is not clear to the Court . . . whether there is a private right of action under the statute.").

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837–39. The district court ruled that Congress could not have intended to preclude a private right of action in § 5(b)(2) because Congress crafted the 2002 amendment to mirror federal case law that developed pursuant to the Commerce Clause and Tonnage Clause. *Id*. at 845–47. Reasoning that private plaintiffs had been allowed to enforce the limitations imposed by the Tonnage Clause, the court decided that Congress must have intended to allow private plaintiffs to enforce the same restrictions pursuant to § 5(b)(2). *Id.* at 847 ("Because private plaintiffs have been able to enforce the prohibitions of the Tonnage Clause in courts, Congress must have intended that private plaintiffs would be able to enforce these same prohibitions under Section 5(b) of the RHAA."). We agree with the court's conclusion that Congress intended the 2002 amendment to codify common law that had developed pursuant to the Tonnage Clause and Commerce Clause since the RHA was enacted, but we are obliged to apply *Cort* to determine whether Congress intended to create a private right of action in § 5(b)(2). Having done so, we conclude the amendment was not enacted for the purpose of conferring a benefit on vessels. Rather than including rights-creating language, § 5(b) limits the conduct of non-federal entities for the benefit of the public at large. *See Sierra Club*, 451 U.S. at 298.

We find no indication that Congress intended to create an implied private right of action in § 5(b)(2). Accordingly, we conclude the district court did not err by granting summary judgment on Lil' Man's § 5(b)(2) claim.

AFFIRMED.